HR Weekly Podcast
2/14/2008

Today is February 14, 2008, and welcome to the HR weekly podcast from the State Office of Human Resources. This week's topic summarizes the recent publication of proposed changes to the Family Medical Leave Act, or FMLA, by the United States Department of Labor, or DOL.

As a result of the DOL's fifteen years of experience in administering the FMLA; the 1996 and 2001 DOL studies on the FMLA; several United States Supreme Court cases and lower court rulings; and the public's responses to the DOL's December 2006 Request for Information, the DOL published proposed changes to FMLA regulations on February 11th. Public comments to these proposed changes are due by April 11, 2008. The two major changes to current regulations are modifications in the definition of a "serious health condition" and the current medical certification process.

First, according to FMLA critics, the DOL's current definition of a "serious health condition" is vague and confusing. In the proposed changes, the DOL retained its existing definition, but modified the definition of "continuing treatment." Current regulations state that a continuing treatment for a serious health condition may "involve treatment two or more times by a healthcare provider," which is open-ended and contains no time limits. The proposed changes specify that the two visits must occur within thirty days of the start of the period of incapacity, unless there are extenuating circumstances. Also, in the existing regulation, a chronic serious health condition is one that requires periodic visits to a healthcare provider, yet the term "periodic" is not specified. The proposed changes now define "periodic" to be twice or more a year.

Second, the DOL's proposed rule changes modify the current medical certification process and alter the DOL's WH-380 form. There is proposed language that would specify when medical certification from an employee's healthcare provider is incomplete. When medical certification is incomplete, the proposed changes require employers to state in writing to the employee what additional medical information is needed. Then, the employee would have seven calendar days to provide the information. Employers must also notify the employee if the medical certification is not returned within the fifteen day time period, unless that is not practicable. A controversial change to the current regulations recommends that employers make direct contact with an employee's healthcare provider to validate and clarify medical certifications. Employers must still obtain employee authorization beforehand, however, to comply with the Health Insurance Portability and Accountability Act, or HIPAA.

Because of the recent expansion of the FMLA to cover employees who take time off when family members are on or going into active military duty, or to care for a wounded service member, the DOL is also requesting comments to the definition of "qualifying exigencies." As discussed in the HR Weekly Podcast on January 29th, one of the military leave provisions would allow an employee to take FMLA leave for "any qualifying exigency arising out of the fact that the spouse, son, daughter, or parent of an employee is on active duty, or has been notified of an impending call or order to active duty, in support of a contingency operation." The DOL is requesting comments from the public regarding whether the definition of "qualifying exigency" should be limited to "those items of an urgent or one-time nature arising from the deployment as opposed to routine, everyday life occurrences." Last, the DOL has received many questions on how to apply the current FMLA medical certification requirements for serious health conditions to leave taken to care for wounded service members.

For additional information, please visit the DOL's website at www.dol.gov. If you should have any questions regarding any information in this podcast, and would like to send a comment on the rule changes to the DOL, please call your HR Consultant at 803-737-0900.

Thank you.